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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 397

UNITED STATES OF AMERICA, *Petitioner*

v.

STATE ROAD DEPARTMENT OF FLORIDA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on May 30, 1951.

OPINIONS BELOW

The District Court for the Northern District of Florida wrote two opinions. The first (R. 91), dealing with respondent State Road Department's motion to strike parts of the answer, is reported

at 78 F. Supp. 278. The second (R. 158), containing the findings and conclusions on the merits, is reported at 85 F. Supp. 489. The opinion of the Court of Appeals (R. 1311) is reported at 189 F. 2d 591.

JURISDICTION

The judgment of the Court of Appeals was filed on May 30, 1951 (R. 1318). A timely petition for rehearing (R. 1319) was denied on July 26, 1951 (R. 1336). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below, in determining that there was negligence on the part of Government employees under the Federal Tort Claims Act, imposed on the Government an erroneous standard of more than due and reasonable care.

2. Whether, in an action under the Federal Tort Claims Act predicated on negligent damage to a State bridge, the respondent may, in addition to the cost of repairs to the bridge, also recover the cost of building, maintaining, and removing detours around the damaged sections of the bridge while it was being repaired.

3. Whether the failure of an insurer-partial subrogee, having a claim against the United States under the Federal Tort Claims Act, to institute suit or join in an existing suit by the insured within the statutory period of limitations bars the claim to the extent of the subrogee's interest.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), are as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The pertinent provisions of the Florida Statutes, relating to damage to the state roads and to the capacity of the State Road Department to sue, Fla. Stat. Ann. 341.24, are as follows:

> The state road department shall maintain the state roads and protect and preserve the same from trespass and injury and prevent such use of, and traffic on, said roads as is or

> will be liable to injure or destroy the same, and is or will be liable to endanger the comfort and safety of public travel on said roads. Said department shall make and maintain said roads safe for the use of sober, law-abiding citizens who desire to travel over the same.
>
> Any person shall be civilly liable to the department for the actual damage to the highway by reason of his wrongful act, which damage may be recovered by suit, and when collected shall be paid into the state treasury to the credit of the state road tax fund.

The provisions of the Florida Statutes, relating to liability for damage to the highways, Fla. Stat. Ann. 320.54(6), are as follows:

> *Civil liability.* Whoever damages any state road by any trespass on, unlawful use of, or traffic over such road shall be civilly liable for the amount of such damage, which amount may be recovered at the suit of the state road department, and when recovered shall be turned into the state treasury and placed to the credit of the state road tax fund.

STATEMENT

The State Road Department of Florida brought this action, under the Federal Tort Claims Act, to recover for damage to the structure of the Thomas A. Johnson Bridge over the harbor of Pensacola. The damage occurred when four liberty ships,

owned by the War Shipping Administration (R. 37, 40, 41, 42), dragged anchor and were blown into the bridge during a severe rain and wind squall on the night of May 19-20, 1946 (R. 160).[1] After the disposition of certain preliminary motions and a trial before Circuit Judge Waller, sitting as district judge, the Road Department and its subrogee, the respondent Aetna Insurance Company, recovered a judgment for $361,637.58, which was affirmed by the court below.

1. The bridge was owned by Escambia County, Florida, and leased to the Road Department (R. 158). The Road Department sued in its capacity as lessee, claiming to have a duty to keep the bridge in repair (R. 160). The Road Department is an agency of the State of Florida (R. 31), charged with the duty of maintaining the state highway system. Fla. Stat. Ann. 341.24.

On the night of the collisions, 21 liberty type cargo steamers lay at anchor in Pensacola Bay, including the four vessels of the petitioner. They

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[1] The Admiralty Extension Act of 1948, 62 Stat. 496, 46 U.S.C., Supp. IV, 740, transferred jurisdiction over suits against the United States for damages occurring on land but caused by public vessels on navigable waters from the Tort Claims Act to admiralty, under the Suits in Admiralty Act and the Public Vessels Act. However, since the present cause of action arose and suit was filed before the effective date of this 1948 statute (R. 11), the statute does not abate the action; and its only significance for the present case is in connection with the applicable period of limitations, discussed below. See fn. 5, *infra*, p. 20.

were light, without cargo (R. 159). Pensacola Bay is a large, landlocked harbor with a good holding bottom. The harbor is exceptionally safe as an anchorage (R. 159-160). All of the vessels were anchored westward of the highway bridge and the petitioner's vessels were anchored nearest to the bridge. The petitioner's vessels were properly anchored (R. 160, 162).

The weather in Pensacola in May is the mildest of the year (R. 1102), but thunderstorms are frequent. The official weather forecast was for cloudy weather with showers and thunderstorms and moderate southerly winds. No storm warnings were displayed or issued, and no storm was forecast. Barometric pressure remained constant (R. 162-163).

That night, as predicted, it was overcast and there was an eleven knot breeze, south-southeasterly. Later, the overcast increased and shortly after midnight lightning appeared and general indications pointed to the approach of a thunderstorm (R. 166). The thunderstorm came overhead at about 1:30 o'clock a.m. with a 30 knot breeze. Heavy rain then fell. Within a minute, wind struck with tremendous velocity, reaching a force of 75 or more miles an hour. The fierce wind blew from the southwest only for about fifteen minutes, blowing toward the bridge and catching the vessels in its path (R. 163, 166-170). In the short interval of the intense wind, 14 of the anchored vessels dragged their anchors and petitioner's vessels

nearest the bridge were forced into the collision with it. Some of the vessels anchored collided with each other and one moored to a dock was driven from its mooring (R. 163, 169).

The Government's theory was that its ships took all usual and reasonable precautions against dragging anchor in any ordinary squall, but that the squall which struck was so unforeseeably violent that reasonable precautions proved insufficient (R. 177-179). The trial court, however, stated that more than reasonable care was required in the circumstances; that the standard was one of extraordinary care (R. 180, 182). It went on to make findings of specific conduct by the ships that it considered negligent (R. 171-176, 187), and to hold the Government liable. The Court of Appeals held, over the dissent of Judge Holmes (R. 1317), that, although the trial court misstated the standard of care, the error did not, in view of the findings, result in any misapplication of the law to the facts of the case (R. 1314).

2. Some 40 per cent, $146,037.02, of the total damages of $361,637.58 was allowed for the cost of building and removing allegedly temporary detour bridges around the parts of the main bridge which the accident made impassable (R. 161). The remainder of the judgment was for the cost of repairing the main bridge. The district court rejected the Government's contention that neither under the Florida statute nor under the general

law of damages were the plaintiffs entitled to recover the cost of the detour bridges (R. 91); and the court below upheld the district court (R. 1316).

3. As insurer of the bridge, the Aetna Insurance Company had paid the Road Department $215,000, for the damage for which the United States was held liable below. The United States alleged, as a partial defense to the action as initially brought by the Road Department, that the Road Department's claim was barred to the extent of $215,000 (R. 73-77). To this partial extent, it was contended, Aetna became subrogated to the Road Department's claim; hence—to this extent—Aetna was the only real party in interest, and suit could be brought only in Aetna's name. This defense, on plaintiff's motion (R. 87), was ordered struck (R. 97). Thereupon, the United States moved to require the subrogee's joinder as a necessary party plaintiff (R. 98). This motion was granted (R. 103), and Aetna joined as plaintiff (R. 105). Next, the United States proceeded to set up the defense that Aetna's claim was *pro tanto* barred by the expiration of the period of limitations, the last date for filing suit under the limitation provision of the Tort Claims Act, 60 Stat. 845, having been August 2, 1947, and Aetna's joinder as plaintiff not having taken place until September 28, 1948 (R. 111). This defense, too, the district court ordered struck (R. 125). On appeal, the court below upheld this action, on the theory that Aetna's joinder as sub-

rogee related back to the filing of the original complaint by the Road Department (R. 1314).

REASONS FOR GRANTING THE WRIT

This case presents a number of substantive questions under the Tort Claims Act, erroneously answered by the court below, which involve wide considerations of general tort law warranting review by this Court.

1. The first question relates to the trial court's statement of the applicable standard of care. It is apparent that the proper standard of care is an element in almost every case under the Tort Claims Act and implicitly involves a construction of the Act itself. Although the Act allows recovery in accordance with local law, it imposes the limitation that the damages must result from "negligent or wrongful" conduct of the Government's employees. Presumably negligence, as so used in the Act, has its usual meaning of want of due care; and, since the trial judge required a higher standard, he thereby imposed an obligation on the United States which the Act does not warrant.[2]

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[2] In its conclusions of law the trial court stated that law thus:

> * * * each vessel must show that it exercised proper care under the circumstances, and this case will be determined by what was due care under the circumstances. *If the masters of these vessels were merely required to exercise ordinary or reasonable care after the officers of these vessels discovered their peril, then the Defendant would doubtless be entitled to a judgment in its favor.* We, therefore, must determine what was the degree of caution

The Court of Appeals, in affirming the judgment of the District Court, conceded, as it must, that the trial court's formulation of the standard of care was erroneous. But it took the position that, reading the findings and conclusions as a whole, there was reason to believe that the trial court did not actually apply the erroneous standard it set out (R. 1314). We submit that the findings and conclusions do not justify this position. On the contrary, it seems clear that the trial court was applying its own misstatement of the law to the facts, and that a large judgment against the United States has been rested on a plainly incorrect ruling of law.

a. A reading of the trial court's opinion as a whole suggests only two possible explanations for the Court of Appeals' stated "conviction" that the mistaken standard was not actually applied; but neither of them, we submit, is at all persuasive. One possibility is that the court below felt that the trial judge meant no more than that the precautions required of a single vessel in an empty har-

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and care which the circumstances demanded of the masters of these vessels (R. 180) (italics supplied).

Later, the court again said:

> It was the duty of the masters of these vessels to know and to understand their responsibility in the situation that they were in on the occasion in question. *Ordinary care or reasonable care was not the test, but a very high degree of care and caution were required under the circumstances present at the time* (R. 181-182) (italics supplied).

bor with clear weather on the horizon were not adequate in the circumstances of this case. Here, the harbor was crowded; the ships were near the bridge; being unladen, they were rather difficult to maneuver in a storm; and a storm was threatening (R. 180-181). In these circumstances, due care of course required different conduct than in less dangerous circumstances. If the judge's stated requirement of extraordinary care meant no more than this, it would not have been harmful. But it is very clear that it did mean something more. For, as the judge was well aware, the Government conceded that different conduct was required in different circumstances. As he carefully stated, the Government's position was not that extra precautions need not be taken in a storm, but that the extra precautions taken—admittedly sufficient to weather any ordinary storm in that harbor—proved insufficient to meet the effects of the unforeseeably violent storm which occurred (R. 177-180). Since the judge did not, and could not, find that the violence of the storm was foreseeable by the exercise of normal care, he must have been holding that the Government's standard—ordinary or reasonable care in the known circumstances—was insufficient and that an exceptional degree of care was required either in anticipating the actual force of the storm or in taking precautions against the normal storm which was foreseeable.

b. Alternatively, the Court of Appeals might have felt that the findings of specific negligent conduct on the part of the officers and crews of the individual ships were the basis of the ultimate finding of negligence and that these specific acts were measured by the proper standard of care. The judge did find that there was such specific negligence as failure to keep a certain number of men on watch; failure to take action for some time after the anchors were discovered dragging; failure, in one case, to have an extra anchor aboard; and, in one case, drunkenness of the captain (R. 171-176).

But the significant point is that there is no finding that the absence of any of this allegedly negligent conduct would have prevented the accident from occurring, or that these specific acts contributed to the disaster. Thus, fourteen of the twenty-one ships in the harbor dragged anchor in the storm but only those nearest the bridge struck it (R. 180); there were, apparently, no such specific acts of negligence on the part of all fourteen of the ships as that alleged on the part of the four which were the subject of suit.

It is clear, as a proposition of law, that if the ships would have dragged anchor even though they all exercised every reasonable precaution against it, then their failure to exercise certain precautions is not a cause of the harm which occurred; and they cannot be held liable. Cf. *Ford* v. *Trident Fisheries Co.*, 232 Mass. 400, 122 N. E. 389 (no liability for negligent failure to provide a lifeboat, where

seaman would have drowned even though lifeboat were provided); *New York Cent. R. R.* v. *Grimstad,* 264 Fed. 334 (C. A. 2). The judge nowhere found that further precautions could or would have prevented the ships from dragging anchor in a storm as violent as that which struck.

Equally important, since the judge wrongly stated the applicable standard of care, it is impossible to say that the specific conduct he found to be negligent was considered negligent under the lower standard which should have been applied. The proper number of seamen on watch, the reasonable interval for discovering that a ship has dragged anchor, and the like—these are matters the characterization of which as negligent or not depends directly on the standard of care applied.

Thus, as Judge Holmes pointed out in dissent, "[The Court of Appeals] is reversing the trial judge's opinion as to the law of the case, but not correcting the harm that resulted from the application to the facts of an erroneous legal principle" (R. 1317).

2. The second question is whether the United States is liable for the cost of the "temporary" detour bridges, later removed, which the Road Department built around the damaged sections of the main structure while the latter was being permanently repaired. The Tort Claims Act predicates liability on the law of the place where the alleged negligence occurred. But while Florida law thus

controls the solution of the problem, the answer does not turn on any unique quirk of Florida law. Rather, this is a question which has arisen, in almost identical terms, in several states. E.g., *State Highway Commission* v. *American Mut. Liab. Ins. Co.*, 146 Kan. 187, 70 P. 2d 20; *Shell Oil Co.* v. *Jackson County*, 193 S. W. 2d 268 (Tex. Civ. App.); *State* v. *F. W. Fitch Co.*, 236 Iowa 208, 17 N. W. 2d 380. Moreover, the question was novel in Florida, and the court below drew in part on the general principles of the common law in reaching its decision. Thus, the issue is one of general significance, wherever the Tort Claims Act may be invoked, and where there is no controlling state law.

The Florida statute creating the cause of action expressly limits recovery to "the actual damage to the highway." Fla. Stat. Ann. 341.24. It seems plain that this means the cost of repairing the highway—in this case the bridge—and not any incidental or consequential costs, such as the cost of detours or new highways. This conclusion is supported by the holdings of the courts of other states under similar statutes. E.g., *State Highway Commission* v. *American Mut. Liab. Ins. Co., supra; Shell Oil Co.* v. *Jackson County, supra; State* v. *F. W. Fitch Co., supra.* In these cases, statutes also gave the states causes of action against persons causing damage to state highway bridges. They used language such as "damages which the bridge may sustain", and the courts held that un-

der these statutes the cost of detours or detour bridges was not recoverable.

The court below attempted to distinguish these other statutes from the Florida statute on the ground that they referred to damage to the "bridges" rather than to the "highway." The court's theory was that the state had a duty to keep the highway system open to traffic, and thus the statute should be read as permitting recovery for all the expenses of keeping the highway system in a fully efficient condition. But the very purpose of limiting recovery to "the *actual* damage" appears to be to negative such a theory of extensive liability. In the context of the statute (*supra,* pp. 3-4), it is clear that the word "highway" was used, not in order to broaden the tortfeasor's liability, but as a mere synonym for "road", or perhaps to cover bridges and viaducts.

Furthermore, aside from the statutory limitation on recovery, the applicable principles of general law show that the cost of the detour bridges was entirely too remote to be allowable as an item of damage. If the damaged bridge had been privately used, the most that the owner could have recovered, in addition to the cost of repair, would have been the value of the actual loss of the use of the bridge during the repair period. Proof of the cost of detours would not be enough, certainly not without a showing that substitutes of that type and cost were reasonably necessary to the plaintiff's business during the period of non-use. Cf. *Brook-*

lyn Eastern District Terminal v. *United States,* 287 U.S. 170. Similarly, respondents should not have been permitted to recover the expense of the "temporary" detours—costing about sixty per cent as much as the repairs to the permanent bridge (R. 161, 188)—in the absence of proof, at the very least, that detour bridges of that type and cost were required by the amount of traffic, the length of time needed for repairs on the permanent structure, and the difficulty or impossibility of using alternate routes while the bridge was being fixed. In other words, the value of the true loss of use of the bridge should have been, but was not, shown. Instead, the United States was saddled with the full cost of an expensive, and perhaps unnecessary substitute bridge.[3]

Not only have the respondents failed properly to prove their damages even on the assumption that the bridge was used in a private enterprise, but the courts below, in awarding the cost of the substitute bridge, have also disregarded the significant fact that the bridge is governmentally owned and operated for governmental purposes. The Court of Appeals felt that the State's duty to

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[3] Respondents made no effort to prove the facts referred to in the text or to show what was the value of the lost use of the damaged bridge. They simply relied on the statutory and contractual obligations to keep the bridge open for traffic, and sought recovery of the full cost of the temporary structure (R. 1315). In the absence of proper proof, no award can be made. *Brooklyn Eastern District Terminal* v. *United States,* 287 U.S. 170, 174.

keep the highway system running continously justified recovery of the expense of putting up the detours. But this expense was a necessary result of the state's governmental functions, and was not related to its proprietorship of the bridge. If, for example, the bridge, when it was damaged, had been in the hands of Escambia County, its owner and the Road Department's lessor, the state would still have had the same duty to keep the highways in operation; but it is highly questionable whether this would have given rise to a cause of action. Compare *The Manhattan*, 10 F. Supp. 45 (E. D. Pa.), affirmed, 85 F. 2d 427, 429 (C.A. 3), in which a defendant negligently sank a vessel of the United States in a channel; and the Government claimed not only the value of the vessel but the cost of removing the vessel from the channel as an obstruction to navigation. It was the governmental duty of the United States under statute to remove the wreck as an obstruction to navigation and to keep navigable channels clear. The Third Circuit held that the expense of removing the wreck was not a recoverable damage of the United States because the expense was attributable to the performance of its governmental function and duty and not to the tort. The duty to raise the wreck existed independently of whether the Government could recover the value of the sunken ship. In direct contrast to the Third Circuit, the court below has ruled that the temporary detour expense became a recoverable proximate damage because it was an

incident of the performance of the State's governmental function of keeping the highway open to important arterial traffic.

3. The final question is whether Aetna's failure to join as a party plaintiff until after the expiration of the period of limitations bars its claim. The answer to this question turns on the interaction of this Court's decision in *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, with Federal Rule 17(a), the real-party-in-interest rule. We believe that a decision of this point will be helpful in completing the pattern of relationships, most of which was laid out by the decision in *Aetna*, among plaintiffs, subrogees, and the United States, in actions under the Tort Claims Act.

Aetna, having partially insured the loss to the bridge, paid the claim to the extent of $215,000 and to that extent became subrogated to the Road Department's claim against the United States. It did not, however, join in the action against the United States until September 28, 1948, more than two years after the cause of action arose. (The period of limitations at that time was one year, or August 2, 1947, whichever was later). The Government interposed the defense of limitations, but it was rejected. The trial court gave judgment for the Road Department and included in the judgment a proviso that Aetna should receive $215,000 from the proceeds (R. 191).

Federal Rule 17(a) provides that every action shall be brought in the name of the real party in interest.[4] Under *Aetna* it is clear (1) that both the insured and insurer have substantive rights against the tortfeasor which qualify them as real parties in interest; (2) that both insured and insurer own portions of the substantive right and should appear in the litigation in their own names; and (3) that both are "necessary" parties and the pleadings should be made to reveal and assert the actual interest of the plaintiff and the interests of any others in the claim. 338 U.S. at 380-382. It is likewise clear that two suits can be brought, one by the insured and one by the subrogee. 338 U.S. at 382. Thus, the result of the *Aetna* decision and Rule 17(a) is that the claims of the insurer-subrogee and of the insured are separate and distinct, and each must be asserted in the name of the claimant in order to be vindicated. It follows that suit must be brought on each claim within the time limited by statute. This is clearly the case with respect to separate actions by the subrogee, and it

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[4] "Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

should equally be so in the case of a joinder by the subrogee in the insured's cause of action.

Yorkshire Inc. Co. v. *United States,* 171 F. 2d 374 (C.A. 3), one of the companion cases affirmed with *Aetna,* upheld the right of the partial subrogee to bring the action in its own name without joining the insured. In that case, after the period of limitations, motion was made to join the insured as plaintiff, and the motion was denied by the district court as coming out of time. The Court of Appeals approved this view, on the ground that there must be some limit on the multiplicity of suits. 171 F. 2d 374, 377. The same result should be required when the motion to join the subrogee in an action brought by the insured comes out of time.[5]

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[5] There is no merit in the contention that the limitation issue was rendered moot by the amendment of April 25, 1949 to the Tort Claims Act. This amendment extended the period of limitations to two years or April 25, 1950, whichever is later. 28 U.S.C. 2401(b). However, if our view is accepted, Aetna's claim became barred on August 2, 1947. The need for deciding whether the amendment to the limitation provision then revived Aetna's theretofore barred claim is obviated by the operation of the Admiralty Extension Act of 1948, 62 Stat. 496, 46 U.S.C., Supp. IV, 740, in transferring jurisdiction of the cause to admiralty. (There is no doubt that the applicable admiralty period of limitations had expired. 46 U.S.C., Supp. IV, 745). Thus, the 1949 amendment, applying only to the Tort Claims Act, had no effect on this cause. If, on the contrary, the view of the court below to the effect that the subrogee's claim dates back to the original filing of suit by the insured is accepted Aetna's claim was timely under the Tort Claims Act as it read before amendment; and for

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER, 1951.

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this reason the Admiralty Extension Act does not apply to it. (See footnote 1, *supra*). Hence, the issue as to which view is correct is clearly not moot in this case. On the other hand, the peculiar effect of the Admiralty Extension Act on this case does not limit the generality of the question presented, which remains applicable in all future cases under the Tort Claims Act.

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